

No. 456567

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

NELSON G. HERNANDEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JUDGE J. COSTELLO

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. Assignment of Errors	1
II. Statement of Facts.....	1
III. Argument	4
A. The Trial Court Erred When It Did Not Strictly Comply With The Directive From The Appellate Court.	4
B. In The Alternative, The Trial Court Abused Its Discretion When It Did Not Believe It Had The Discretion To Consider A Exceptional Downward Sentence.....	6
IV. Conclusion	7

TABLE OF AUTHORITIES

Washington Cases

<i>In re Marriage of McCausland</i> , 129 Wn.App. 390, 118 P.3d 944 (2005), reversed on other grounds, 159 Wn.2d 607, 152 P.3d 1013 (2007)	5
<i>In re Mulholland</i> , 161 Wn.2d 322, 166 P.3d 677 (2007)	6
<i>In re Pers. Restraint of Carle</i> , 93 Wn.2d 31, 604 P.2d 1293 (1980).	4
<i>In re Wilson's Estate</i> , 53 Wn.2d 762, 337 P.2d 56 (1959).	5
<i>State ex. rel. Smith v. Superior Court for Cowlitz County</i> , 71 Wash. 354, 128 P.648 (1912)	5
<i>State v. Garcia-Martinez</i> , 88 Wn.App. 322, 944 P.2d 1104 (1997).	6
<i>State v. Kilgore</i> , 167 Wn.2d 28, 216 P.3d 393 (2009)	4
<i>State v. Melick</i> , 131 Wn.App. 835, 129 P.3d 816 (2006)	4
<i>State v. Pettitt</i> , 93 Wn.2d 288, 609 P.2d 1364 (1980)	6
<i>State v. Schwab</i> , 134 Wn.App. 635, 141 P.3d 658 (2006), <i>aff'd</i> , 163 Wn.2d 664, 185 P.3d 1151 (2008)	5

Statutes

RCW 9.41.040	6
RCW 9.94A.535	6
RCW 9.94A.589(1)(c)	6

I. ASSIGNMENT OF ERROR

- A. The resentencing court erred when it did not strictly comply with the limited scope of the appellate court's mandate.
- B. In the alternative, the resentencing court abused its discretion when it did not believe it had discretion to impose an exceptional downward sentence.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Did the trial court err when it did not strictly comply with the limited scope of the appellate court's mandate?
- B. Where the trial court does not believe it has discretion to consider a mitigated exceptional sentence, has it abused its discretion?

II. STATEMENT OF FACTS

Based on events that occurred over a two-day period in June 2009, Nelson Hernandez was charged by second amended information with 17 crimes:

Burglary First Degree	Counts 1,10
Residential Burglary	Counts 2,8, 11
First-Degree Theft	Counts 4,9,14
Theft Of A Firearm	Counts 5, 12
Unlawful Possession Of A Firearm	Counts 6,17
Possession Of A Stolen Firearm	Count 13
Possession Of Stolen Property	Count 15
Trafficking In Stolen Property	Count 16

(CP 84-90).

After a jury trial, he was convicted of the following:

First Degree Burglary	Count 1
Residential Burglary	Count 2, 8, 11
First Degree Theft	Counts 4,14
Theft of A Firearm	Counts 5,12
Theft in the Second Degree	Count 9
Possession of a Stolen Firearm	Count 13
Possession of Stolen Property	Count 15
Trafficking in Stolen Property First Degree	Count 16
Unlawful Possession of A Firearm Second Degree	Count 17

(Supp. designation of CP –dated 11/1/10).

At sentencing, the court merged counts 1 and 2 and counts 14 and 15. Based on the State’s argument, the court did not merge count 13, possession of a stolen firearm, with the sentence for count 12, theft of a firearm.¹ (CP 111-127). Mr. Hernandez was sentenced as follows:

Count I	116 months	Count IV	57 months
Count V	102 months	Count VIII	84 months
Count IX	29 months	Count XI	84 months
Count XII	100 months	Count XIII	90 months
Count XIV	57 months	Count XVI	84 months
Count XVIII	60 months		

(CP 93).

The judgment and sentence stated “Sentences in Counts XII, XIII, and XVII to run consecutively to each other. All other counts to run concurrently.” (CP 95). The total period of confinement ordered by Judge Fleming was 250 months.

¹ See *State v. Nelson Hernandez*, partially published, 172 Wn.App. 537, 542, 290 P.3d 1052 (2012).

Mr. Hernandez appealed and in 2012, the reviewing Court accepted the State's concession that count 13, possession of a stolen firearm should have merged with count 12, theft of a firearm. The Court remanded for vacation of the conviction for possession of a stolen firearm and ordered resentencing on that count. (CP 119).

In a hearing held December 6, 2013, before Judge Costello, (not the original trial judge), the State argued that Mr. Hernandez's sentence should now, for the first time, include serving a consecutive sentence for Count 5, in place of the vacated count 13. (RP 5).

The court questioned defense counsel regarding the consecutive sentences and asked, "Do you agree that this court is required by statutory law to impose consecutive terms for Counts 5, 12, and 17?" Defense counsel agreed. (RP 15-16).

The court imposed the following sentence for each count, resulting in a 250-month confinement.

Count I	116 months	Count IV	57 months
Count V	95 months	Count VIII	84 months
Count IX	29 months	Count XI	84 months
Count XII	95 months	Count XIV	57 months
Count XVI	84 months	Count XVIII	60 months

Mr. Hernandez made a timely appeal. (CP 150).

III. ARGUMENT

A. The Trial Court Erred When It Did Not Strictly Comply With The Directive From The Appellate Court.

Where a party is a principal thief, he may not also be convicted of receiving or possessing stolen goods. *State v. Melick*, 131 Wn.App. 835, 840-41, 129 P.3d 816 (2006). In instances where the act of stealing and possessing the stolen item are charged and a conviction results, the trial court should vacate one of the convictions prior to sentencing. *Id.* at 843-44. Such was the case here; the reviewing Court recognized the imposed sentence for possession of a stolen firearm and theft of the same firearm was error.

Where one portion of a sentence is found to be erroneous, that erroneous portion does not undermine the otherwise valid part of the sentence. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980). Following a remand for resentencing, the trial court's discretion is limited by the scope of the appellate court's mandate; the trial court must strictly comply with the directive from the appellate court, with no leave for the trial court to exercise its discretion. *State v. Kilgore*, 167 Wn.2d 28, 42, 216 P.3d 393 (2009); *State v. Schwab*, 134 Wn.App. 635, 645, 141 P.3d 658

(2006), *aff'd*, 163 Wn.2d 664, 185 P.3d 1151 (2008). The superior court may exercise discretion where an appellate court directs it to “consider” an issue, although in so doing, it must adhere to the appellate court’s instructions. *State ex. rel. Smith v. Superior Court for Cowlitz County*, 71 Wash. 354, 357, 128 P.648 (1912).

Here, the language used by the reviewing Court unequivocally directed the trial court to vacate the conviction for possession of a stolen firearm and resentence on that count. The trial court was not given the discretion to substitute count 5 for the vacated count 13 consecutive sentence. A mandate issued by the Court of Appeals is binding on the superior court, and must be strictly followed. *In re Marriage of McCausland*, 129 Wn.App. 390, 399, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607, 152 P.3d 1013 (2007). The superior court lacks jurisdiction to address issues beyond those for which the case has been remanded. *In re Wilson’s Estate*, 53 Wn.2d 762, 337 P.2d 56 (1959).

The sentencing court exceeded the authority granted by the Court of Appeals’ mandate. This matter should be remanded for correction, with deletion of the additional consecutive sentence of count 5.

B. In The Alternative, The Trial Court Abused Its Discretion
When It Did Not Believe It Had The Discretion To
Consider A Mitigated Exceptional Downward Sentence.

RCW 9.94A.589(1)(c) mandates that consecutive sentences must be imposed if a defendant is convicted under RCW 9A.040 for unlawful possession of a firearm and crimes of theft of a firearm or possession of a stolen firearm. Generally, a defendant may not appeal a trial court's refusal to impose an exceptional sentence, but appellate review is permitted when a court refuses to exercise discretion or relies on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997). Failure to exercise discretion is itself an abuse of discretion. *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

Here, the court specifically indicated it believe it was required by statutory law to impose consecutive terms for Counts 5, 12, and 17. However, the court may depart from the standards of RCW 9.94A.589 and impose an exceptional sentence if it finds that mitigating factors justify such a departure. *In re Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677 (2007); RCW 9.94A.535.

The court did have a choice, and its failure to recognize its authority and exercise its discretion in considering mitigating factors was a fundamental defect. A different sentence could have been imposed had the trial court correctly applied the law.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hernandez respectfully asks this Court to remand to the trial court for deletion of the substituted consecutive sentence.

Dated this 17th day of June 2014.

Respectfully submitted,

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STATE OF WASHINGTON COURT OF APPEALS

DIVISION II

State of Washington,)	Court of Appeals No. 456567
Respondent)	
v.)	
NELSON G HERNANDEZ,)	Certificate of Service
Appellant)	

I, Marie J. Trombley, attorney for Appellant NELSON G. HERNANDEZ, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the APPELLANT'S BRIEF was sent by first class mail, postage prepaid on June 17, 2014, to

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